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# **Right Or Duty? Is Presence At Trial A Right Or A Duty In International Criminal Law?**

## **ABSTRACT**

International criminal law has long recognised the right of the accused to be present at trial as part of his or her right to a fair trial. However, modern international criminal courts and tribunals have recently found that the accused also has a duty to be present at trial. Do both a right to be present and a duty to be present exist and, if so, are they compatible under international criminal law? To answer these questions this article will first identify and examine the differences between a right and a duty. Next, it will consider the relevant international case law and how the courts and tribunals have characterised the presence of the accused. Finally, it will also consider the purposes underlying both the right and the purported duty to be present. The article concludes that international criminal law currently recognises both a right and a duty to be present on the part of the accused although one may be incompatible with the other. It also warns that the application of the duty must not be allowed to subsume the accused's exercise of the right, and that the enforcement of the duty must be done with due care for the accused's right to a fair trial.

**Keywords:**    **International Criminal Law, Fair Trial Rights, Rights of the Accused, Right to be Present**

## I. INTRODUCTION

It is generally believed that individuals accused of crimes under international criminal law have a right to be present at trial. All of the modern international criminal statutes include a section detailing the rights of the accused and each includes the right of the accused to be present at trial. However, the International Covenant on Civil and Political Rights, the convention on which most of the international tribunal statutes are based, does not explicitly refer to a right to be present at trial, but rather, describes the accused presence as one of the minimum guarantees that must exist to ensure that trial is fair.<sup>1</sup> Additionally, the Council of Europe has described the presence of the accused at trial as both a right and a duty.<sup>2</sup> Further, both the International Criminal Tribunal for Rwanda and the International Criminal Court have found that the accused has both a right and a duty to be present at trial. Therefore, the question becomes, is the presence of the accused at trial both a right and duty and, if so, what are the implications for the accused?

It is necessary, as a preliminary matter, to define the terms ‘right’ and ‘duty’. Surprisingly, these terms are generally undefined in international law. None of the most influential human rights documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights, define a right or a duty in a general sense. The American Declaration of the Rights and Duties of Man rather unhelpfully states in its

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<sup>1</sup> Article 14(3)(d), International Covenant on Civil and Political Rights, (1966) (“Article 14(3)(d)”).

<sup>2</sup> *Judgments in Absentia*, Council of Europe, Committee of Experts on the Operation of Conventions in the European Field (3 March 1998) at 7 (“Council of Europe Report”).

Preamble that “[w]hile rights exalt individual liberty, duties express the dignity of that liberty.”<sup>3</sup> Therefore, recourse to more general legal sources is necessary to produce a working definition of these terms. A ‘right’ is “[s]omething that is due to a person by just claim, legal guarantee or moral principle” and is defined by the ability of the holder of the right to “decide whether to exercise it or not and to bear the consequences of that decision.”<sup>4</sup> It is also a “recognized and protected interest the violation of which is a wrong.”<sup>5</sup> By contrast, a duty is a “legal obligation owed or due to another and that needs to be satisfied.”<sup>6</sup> A duty is also connected to a corresponding right held by another and the person with the duty is bound to do perform the described activity.<sup>7</sup>

The definitions of these terms demonstrate the significant difference between the two. A right may be exercised freely while a duty creates an obligation, requiring the holder of the duty to act. Therefore, if the presence of the accused at trial is considered a right, the accused may decide to appear for trial of his or her own volition and cannot be unilaterally deprived of that choice. If it is considered a duty, the accused is required to appear at trial. Failure to comply with a duty can result in consequences. In the context of presence at trial those consequences can include the relevant tribunal conducting a trial *in absentia* against the accused.<sup>8</sup>

## **II. The Right to be Present at Trial**

Historically, international criminal law did not guarantee the accused’s right to

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<sup>3</sup> Preamble, American Declaration of the Rights and Duties of Man, 1948.

<sup>4</sup> B. Garner (ed.), *Black’s Law Dictionary*, 10<sup>th</sup> Edition (St. Paul (USA): Thomson Reuters, 2014), 1517; M. Böse, ‘Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia’; (2011-2012) 37 *North Carolina Journal of International Law & Commercial Regulation* 489, 503.

<sup>5</sup> Garner, (n. 4 above), 1517.

<sup>6</sup> *Ibid.* at 615.

<sup>7</sup> *Ibid.*

<sup>8</sup> Niccolò Pons, ‘Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State’s Failure or Refusal to Hand over the Accused’; (2010) 8 *Journal of International Criminal Justice* 1307, 1309.

be present at trial. Article 12 of the International Military Tribunal Charter, which formally established the International Military Tribunal at Nuremberg, specifically permitted proceedings to be conducted against an absent accused if that accused “has not been found” or if the Tribunal “for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.”<sup>9</sup> The Nuremberg Tribunal demonstrated its willingness to proceed in the absence of an accused by allowing Martin Bormann to be tried *in absentia* because of the possibility that he was still alive.<sup>10</sup> Bormann was convicted and sentenced to death in his absence.<sup>11</sup>

The International Convention on Civil and Political Rights was the first international instrument to address the accused’s presence at trial as a right. The Convention sets out a wide-ranging rights regime impacting numerous areas of life including the right to a fair trial. Article 14(3)(d) of the Convention specifically asserts that “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) [t]o be tried in his presence...”<sup>12</sup> This article is significant for multiple reasons. First, and most importantly, it is the genesis of the notion that the accused has a right to be present at trial in international criminal law. Second, most of the international criminal courts and tribunals modeled the right to be present expressed in their foundational statutes on the International Convention on Civil and Political Rights and, in some instances, copied Article 14(3)(d) almost verbatim. Finally, there are 168 State Parties and 7 signatories to the International Convention on Civil and Political Rights making its

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<sup>9</sup> Article 12, Charter of the International Military Tribunal, 8 August 1945.

<sup>10</sup> International Military Tribunal Preliminary Hearing, Saturday 17 November 1945, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, Vol. 2, (Buffalo: William S. Hein & Co., Inc., 1947), 25.

<sup>11</sup> Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*; Opinion and Judgment; (Washington D.C.: United States Government Printing Office, 1947), 166, 190.

<sup>12</sup> Article 14(3)(d), (n. 1 above).

provisions applicable to the vast majority of the world.<sup>13</sup>

Regional human rights bodies have also codified the accused's right to be present at trial. In 2007, the African Commission on Human and People's Rights issued its 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'. Those Principles and Guidelines specifically indicate that a person accused of a crime has "the right to be tried in his or her presence."<sup>14</sup> To give effect to that right the African Commission has found that the accused "has the right to appear in person" before the relevant judicial body and that "the accused may not be tried in absentia."<sup>15</sup> If the accused is tried *in absentia* the accused has the right to petition to have the proceedings re-opened on the grounds that there was inadequate notice of trial, that notice was not personally served or his or her failure to appear was the result of exigent circumstances.<sup>16</sup>

The language used by the African Commission in discussing trials *in absentia* highlights the importance of the accused's choice to appear at trial. The Guidelines and Principles set out three grounds for re-opening proceedings conducted *in absentia*. All three involve situations in which the accused did not choose to absent themselves from trial, but where their failure to appear was outside of their control. Trials conducted in the accused's absence are not strictly forbidden, rather, they are only considered illegitimate if they are conducted under circumstances that suggest the accused did not actively choose not to be present. This emphasis on the accused's choice confirms that the African Commission views presence at trial as a right.

Two other regional human rights organisations have also addressed the right to

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<sup>13</sup> Status of Ratification Dashboard, Office of the High Commissioner for Human Rights, <http://indicators.ohchr.org> (accessed on 15 August 2016).

<sup>14</sup> Section N(6)(c)(i)–(ii), Principles And Guidelines On The Right To A Fair Trial And Legal Assistance In Africa, The African Commission on Human and People's Rights, DOC/OS(XXX)247, 2003.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

be present. The European Convention on Human Rights does not contain a specific reference to the right to be present at trial. However, the European Court of Human Rights (“ECtHR” or “European Court”) has found that the accused’s right to be present is implicit in the object and purpose of Article 6(1) of the Convention because the accused is entitled to take part in a hearing against him or her.<sup>17</sup> The European Court also specifically referred to the presence of the accused at trial as a right.<sup>18</sup> The European Court’s conclusion arises out of a belief that “it is difficult to see” how the accused could exercise other explicit Convention rights, including “the right “to defend himself in person” (Article 6(3)(c)), the right “to examine or have examined witnesses” (Article 6(3)(d)) and the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court” (Article 6(3)(e)), without being present during trial.<sup>19</sup> Based on this holding, even if the right to be present is not an enumerated right, it is implicit in the Convention as it makes operative other important rights held by the accused, including the overarching right to a fair trial.<sup>20</sup>

The European Court’s decision that a right to be present exists in the European Convention also focuses on the accused’s ability to make a choice as to whether he or she wishes to participate in proceedings. Where, the accused has no notion that criminal proceedings are being conducted against them, the accused cannot be found to have made an effective choice not to participate.<sup>21</sup> Absent the ability to make such a choice, the accused is entitled to a new determination of the charges. This indicates that an *in absentia* conviction is only valid if the accused makes an active choice to

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<sup>17</sup> *Colozza v. Italy*, (Judgment), App. No. 9024/80 (12 February 1985), paras. 27-28 (“Colozza Judgment”).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* at para. 27.

<sup>20</sup> M. C. Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, (1993) 3 *Duke Journal of Comparative & International Law* 235, 267; Sarah Podmaniczky, ‘Order in the Court: Decorum, Rambunctious Defendants, and the Right to be Present at Trial’, 14(5) (2011-2012) *University of Pennsylvania Journal of Constitutional Law* 1283, 1289.

<sup>21</sup> *Colozza Judgment*, (n. 17 above), para. 28.

absent him or herself from court.

The Inter-American Court of Human Rights less explicitly endorses the right of the accused to be present at trial in the *Case of Valle Jaramillo et al. v. Colombia*. There, the Inter-American Court found “the impunity in this case is reflected by the trial and conviction *in absentia* of members of paramilitary groups, who have benefited from the ineffectiveness of the punishment, because the warrants for their arrest have not been executed.”<sup>22</sup> Interestingly, this decision approaches presence at trial from a different direction. Rather than finding that the accused was deprived of an opportunity to effectively exercise their rights, the court determined that the *in absentia* trial was little more than a show trial held so that Colombia would appear to be complying with their international obligations under Article 8 of the American Convention on Human Rights.<sup>23</sup> The trial *in absentia* actually protected the accused because the authorities had no real intention of punishing them for their acts even after their conviction.<sup>24</sup> It can be extrapolated from the *Jaramillo* decision that the court prefers that trial take place in the presence of the accused, not only to ensure the rights of the accused are adequately protected, but also to guarantee that the trial will result in a sufficient remedy.

When the International Criminal Tribunal for the former Yugoslavia (“ICTY” or “Yugoslavia Tribunal”) and the International Criminal Tribunal for Rwanda (“ICTR” or “Rwanda Tribunal”) (collectively, “the *ad hoc* tribunals”) were established in the early 1990’s, the statutes of both tribunals followed the example of the International Covenant on Civil and Political Rights and indicated that the

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<sup>22</sup> *Case of Valle Jaramillo et al. v. Colombia*, Series C No. 192 (Judgment of November 27, 2008), para. 165.

<sup>23</sup> *Ibid.* at para. 168.

<sup>24</sup> *Ibid.*



presence of the accused at trial was one of the minimum guarantees of a fair trial.<sup>25</sup> Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia, and Article 20 of the International Criminal Tribunal for Rwanda's Statute which is modeled on the Statute of the Yugoslavia Tribunal, are both titled 'Rights of the Accused' and both explicitly state that the accused is 'entitled' to be tried in his or her presence.<sup>26</sup> The use of the word entitled suggests the existence of a right held by the accused and not a duty to be imposed on the accused. After significant debate, it was determined that this minimum guarantee prevented the *ad hoc* tribunals from conducting trials *in absentia*.<sup>27</sup> That interpretation is reinforced by the Secretary-General's statement that the Yugoslavia Tribunal's Statute reflects the fact that trials *in absentia* are not consistent with the accused's entitlement to be 'tried in his presence' as expressed in Article 14 of the International Convention on Civil and Political Rights.<sup>28</sup>

Like the Statutes of the *ad hoc* Tribunals, the Statute of the International Criminal Court also defines the accused's presence at trial as a right. Article 63(1) of the Rome Statute unequivocally states that "[t]he accused shall be present during the trial."<sup>29</sup> This statement, taken alone, does not indicate whether the accused has a right or a duty to be present at trial because it allows for the possibility that the accused's presence can be required rather than resulting from the exercise of a right. However, if the Statute is read as a whole, it becomes evident that the accused has a right to be present at trial. That is because Article 67, much like Article 21 of the Yugoslavia Tribunal's Statute and Article 20 of the Rwanda Tribunal's Statute, sets out the

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<sup>25</sup> Article 21(d)(4), Statute of the International Criminal Tribunal for the former Yugoslavia; Article 20(d)(4), Statute of the International Criminal Tribunal for Rwanda.

<sup>26</sup> *Ibid.*

<sup>27</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993); U.N. Doc. S/25704; English Version, 3 May 1993, para. 101 ("Secretary-General's Report").

<sup>28</sup> *Ibid.*

<sup>29</sup> Article 63(1), Statute of the International Criminal Court.

‘Rights of the Accused’ and identifies presence at trial as one of the entitlements contained therein.<sup>30</sup>

This interpretation is supported by the Trial Chamber decisions in *Prosecutor v. Ruto and Sang* and *Prosecutor v. Kenyatta*.<sup>31</sup> In both decisions the Chambers determined that defendants at the International Criminal Court have a right to be present at trial.<sup>32</sup> The *Ruto and Sang* Court found that “there is no doubt that presence at trial is a right for the accused” as expressed by Article 67(1)(d) of the Statute.<sup>33</sup> In a similar vein, the *Kenyatta* Court also announced that “[i]t is recognised that the presence of the accused during the trial is ... a right” and that the “[p]resence of the accused is the default position.”<sup>34</sup> The *Ruto and Sang* Court, citing the Appeals Chamber of the Rwanda Tribunal, went on to explain that the purpose of the right to be present is to protect the accused from outside interference that might prevent him or her from effectively participating in trial.<sup>35</sup> Implicit in this finding is that the decision to appear lies with the accused, and that it is effective only if it is the product of the accused’s own free will. It further supports the position that presence at trial is dependent on the accused’s active choice to participate in proceedings.

Even the Special Tribunal for Lebanon’s Statute, which famously contains a provision permitting trials *in absentia*, describes the accused as having a right to be present at trial. Article 16(4)(d) of the Special Tribunal’s Statute is modeled on Article 14(3)(d) of the International Covenant on Civil and Political Rights and

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<sup>30</sup> Article 67(1)(d), Statute of the International Criminal Court.

<sup>31</sup> *Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, (Public Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) No. ICC-01/09-01/11 (13 June 2013), (“Ruto Trial Chamber Decision”); *Prosecutor v. Uhuru Mughai Kenyatta*, (Public Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial), No. ICC-01/09-02/11 (18 October 2013) (“Kenyatta Trial Chamber Decision”).

<sup>32</sup> Ruto Trial Chamber Decision (n. 31 above), para. 35; Kenyatta Trial Chamber Decision, (n. 31 above), para. 124.

<sup>33</sup> Ruto Trial Chamber Decision, (n. 31 above), para. 35.

<sup>34</sup> Kenyatta Trial Chamber Decision, (n. 31 above), para. 124.

<sup>35</sup> Ruto Trial Chamber Decision, (n. 31 above), para. 37; citing *Nahimana, et al. v. Prosecutor* (Judgement), No. ICTR-99-52-A (28 November 2007), para. 107 (“Nahimana Judgment”).

Articles 21 and 20 of the *ad hoc* Tribunals. It indicates that one of the minimum guarantees of a fair trial is that the accused “be tried in his or her presence.”<sup>36</sup> However, the Special Tribunal makes the exercise of that right contingent on the terms of Article 22, the article that sets out the Tribunal’s trial *in absentia* regime. Although the right to be present at trial at the Special Tribunal is circumscribed by its approval of trials *in absentia*, the Special Tribunal tried to create a system that respects both the accused’s right to be present while also allowing trial in the absence of the accused.

It is debatable whether the Special Tribunal’s trial *in absentia* regime is truly compatible with the accused’s right to be present a trial. Rule 106 of the Special Tribunal’s Rules of Procedure and Evidence, effectuating Article 22(1) of the Statute, sets out three situations in which the Special Tribunal may conduct trial in the absence of the accused. They are: (1) the accused has expressly and in writing waived his or her right to be present at trial; (2) the accused has not been handed over to the Tribunal by State authorities within a reasonable time; or (3) the accused has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance and inform him or her of the charges.<sup>37</sup> Unlike other courts and tribunals, that only permit trial to proceed in the absence of the accused if the accused has made the unequivocal choice not to attend, the Special Tribunal allows trials *in absentia* in situations where there is no clear indication that the accused has decided not to be present. Therefore, although the Special Tribunal may explicitly recognise the accused’s right to be present, its unique trial *in absentia* rules imply that the parameters of that right are more circumscribed than in other courts and tribunals.

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<sup>36</sup> Article 16(4)(d), Statute of the Special Tribunal for Lebanon.

<sup>37</sup> Rule 106(A), Rules of Procedure and Evidence, Special Tribunal for Lebanon.

It is clear that a right to be present at trial exists in international criminal law. All of the Statutes governing the conduct of the different international criminal courts and tribunals specifically indicate that the accused has the right to be present.<sup>38</sup> Additionally, many courts and tribunals require clear evidence that the accused chose to be absent before trial can be take place in their absence; the ability to choose being a hallmark of a right. Despite the seeming uniformity amongst these various foundational documents, different courts have interpreted that right in different ways. Some courts, including the International Criminal Tribunal for Rwanda and the International Criminal Court have also found that in addition to his or her right to be present, the accused also has a duty to be present at trial.

### **III. The Duty to be Present at Trial**

Although it is generally agreed that the accused has a right to be present at trial, some international courts have also found a corresponding duty to be present at trial. No international court recognising a duty to be present has done so in isolation; it has always been acknowledged together with the accused's right to be present. The idea that the accused's presence at trial is both a right and a duty found initial support in the jurisprudence of the European Court of Human Rights. In *Poitrimol v. France*, the European Court found that the presence of the accused at trial gives meaning to two important aspects of criminal procedure. First, it guarantees the accused's right to a hearing, and second, it serves the evidentiary function of allowing the court to weigh the accused's testimony against that of the victims and witnesses.<sup>39</sup> The European Court observed that to achieve the second goal the legislature of the country in question "must accordingly be able to discourage unjustified absences" and

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<sup>38</sup> Although not discussed in the text, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, The United Nations Transitional Administration in East Timor and the United Nations Interim Administration Mission in Kosovo all specifically recognised the accused's right to be present at trial.

<sup>39</sup> *Poitrimol v. France*, (Judgment), App. No. 14032/88, (23 November 1993), para. 35.

suggests that the accused can be punished for his or her failure to appear (although the Court declined to indicate whether ignoring the right to legal assistance was an appropriate punishment).<sup>40</sup>

The *Poitrinol* decision does not explicitly impose a duty on the accused to be present but it does make clear that domestic legislatures have the authority to implement measures discouraging the accused from refusing to appear at trial.<sup>41</sup> Permitting governments to sanction an accused person for failing to appear at trial implies that the accused has some obligation to appear. A right, by its very nature, may be freely exercised by the right holder. Therefore, the imposition of a penalty on the accused for failing to appear suggests the existence of a duty and not a right because it infringes on the free exercise of the right. Although the European Court does not specify what sanctions are appropriate, it did later find that denying the accused the right to counsel if he or she does not appear is not a permissible sanction.<sup>42</sup>

The Council of Europe's Committee of Experts on the Operation of European Conventions in the Penal Field ("Committee of Experts") was one of the first bodies to explicitly indicate that the accused had a duty to be present at trial. In a memorandum published in 1998 titled 'Judgments in Absentia', the Committee stated that criminal defendants had a duty to be present at trial arising out of the requirement imposed on the defendant that he or she "give a personal account to the court."<sup>43</sup> The Committee of Experts did not offer any further comment on the duty to be present other than to acknowledge that linking the duty with an obligation to forgo one's liberty for the duration of trial may not comport with Article 5 of the European

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Van Geyseghem v. Belgium*, (Judgment) App. No. 26103/95 (21 January 1999), para. 33.

<sup>43</sup> Council of Europe Report, (n. 2 above), 7.

Convention on Human Rights. It also did not attempt to explain how the right to be present and the duty to be present interact with one another.

Several international courts have also found that the accused has a duty to be present at trial. In *The Prosecutor v. Barayagwiza*, the Appeals Chamber of the International Criminal Tribunal for Rwanda found that in order for the accused to make a fully knowledgeable waiver of the right to be present, he or she must be informed of certain facts including “his/her right to be present at trial” and to “be informed that his or her presence is required at trial.”<sup>44</sup> This holding indicates that there is a dual purpose underlying presence at trial. However, it also mischaracterizes the function of presence before the Rwanda Tribunal. Neither the Tribunal’s Statute, nor its Rules of Procedure and Evidence, refer to a duty or requirement on the part of the accused to be present at trial. In fact, the use of the word entitlement in Article 20(4)(d) indicates that presence at trial is a right and not a duty. This is a clear instance of the Appeals Chamber taking a position that is not based on the relevant law and importing it into its findings.

In reaching the conclusion that the accused’s presence at trial constitutes both a right and a duty, the Rwanda Tribunal Appeals Chamber relied on the Human Rights Committee’s Comment in *Mbenge v. Zaire*.<sup>45</sup> The Appeals Chamber asserted that *Mbenge* stood for the proposition that waiver of the right to be present is permitted provided that “in the interest of the sound administration of justice, that the accused has been informed beforehand of the proceedings against him, as well as of the date and place of the trial, and that he has been notified that his attendance is required.”<sup>46</sup> In fact, the comment relating to *Mbenge* says no such thing. Rather, the

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<sup>44</sup> Nahimana Judgment, (n. 35 above), para. 109.

<sup>45</sup> *Mbenge v. Zaire*, Communication No. 16/1977 (25 March 1983) (“Mbenge Comment”).

<sup>46</sup> Nahimana Judgment, (n. 35 above), para. 108.

Human Rights Committee stated in *Mbenge* that “[j]udgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial *and to request his attendance*.”<sup>47</sup> The Appeals Chamber substituted the phrase “to request his attendance” with the phrase “notified that his attendance is required.” This substantively changes the nature of presence at trial from a right that can be freely exercised by the accused, to a duty required of the accused. Therefore, not only did the Appeals Chamber read a requirement into the Statute and the Rules of Procedure that does not exist, it did so on the basis of a faulty interpretation of the relied upon jurisprudence. The Appeals Chamber’s holding may accurately reflect its position as to the issue of presence at trial, however, one should be cautious as to the amount weight one gives the *Barayagwiza* opinion.

The International Criminal Court also found that the accused has a duty to be present at trial in addition to a right to be present.<sup>48</sup> In the *Ruto and Sang* case, Trial Chamber V(A) reached that conclusion on the grounds that Article 63(1) must describe a duty because the right to be present is already asserted in Article 67. In the view of the Court, finding that Article 63(1) and Article 67 describe the same right would mean that there is a redundancy in the Statute.<sup>49</sup> The *Ruto and Sang* Court also found support for its position in Article 58 of the Statute which it claims stands for the proposition that “the accused’s appearance at trial is an obligation, which can be enforced by means of arrest, if not voluntarily undertaken.”<sup>50</sup> Although this decision was later partially overturned on appeal, the underlying principle that the accused has both a right and a duty to be present was not affected by the Appeals Chamber’s

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<sup>47</sup> Mbenge Comment, (n. 45 above), para. 14.1 (Emphasis added.)

<sup>48</sup> Ruto Trial Chamber Decision, (n. 31 above), para. 42; Kenyatta Trial Chamber Decision, (n. 31 above), para. 124.

<sup>49</sup> Ruto Trial Chamber Decision, (n. 31 above), para. 39.

<sup>50</sup> Ruto Trial Chamber Decision, (n. 31 above), para. 40.

decision. The *Kenyatta* Court is less clear as to how it reached its conclusion that Article 63 contains a duty to be present rather than a right, but it implies that its decision is to some extent based on a concern that if the defendant is not obliged to appear at trial, the ‘quest for justice’ would be thwarted.<sup>51</sup>

Both the *Ruto and Sang* and *Kenyatta* Courts emphasised that the accused’s presence at trial is the correct default position and is a reflection of the accused’s duty to be present.<sup>52</sup> In *Ruto and Sang*, the Trial Chamber explained this finding by connecting the duty to be present to the need for judicial control over the proceedings.<sup>53</sup> The Court reasoned that for it to assert the necessary judicial control during trial it is permitted to require the accused to be present so as to maintain jurisdiction over him or her.<sup>54</sup> The Court also announced that Article 63(1) provides a statutory basis for the Chamber “to make impositions on the time and whereabouts of the accused for the purposes of trial” and authorised the Chamber to impose “sanctions and forfeitures” on the accused if he or she failed to comply with the duty to be present.<sup>55</sup>

The Prosecution appealed the *Ruto* Trial Chamber Decision on two grounds specifically challenging: (1) the scope of the requirement under Article 63(1) that the accused be present at trial and the extent to which the Trial Chamber has the power to excuse the accused from attendance; and (2) whether the test for excusal established by the Trial Chamber is supported by the law.<sup>56</sup> The Appeals Chamber declined to

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<sup>51</sup> *Kenyatta* Trial Chamber Decision, (n. 31 above), para. 108

<sup>52</sup> *Ruto* Trial Chamber Decision, (n. 31 above), para. 104; *Kenyatta* Trial Chamber Decision, (n. 31 above), para. 124.

<sup>53</sup> *Ruto* Trial Chamber Decision, (n. 31 above), para. 42.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *The Prosecutor v. William Samoei Ruto and Joseph Arap Sang*, (Judgment<sup>[11]</sup><sub>SEP</sub> on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled “Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial”), Case No. ICC-01/09-01/11 (25 October 2013), para. 7 (“*Ruto Appeals Chamber Decision*”).



directly address the status of presence at trial as a right and a duty. Instead, it held that:

part of the rationale for including Article 63(1) in the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of Article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.<sup>57</sup>

The Appeals Chamber also held that the Trial Chamber is not prevented from using its discretion to excuse an accused from appearing in court, but such an exercise of discretion is more limited than the Trial Chamber thought.<sup>58</sup> The Appeals Chamber's explicit recognition that Article 63(1) reinforces the accused's right to be present at trial, without mentioning a corresponding duty to be present at trial, makes it reasonable to surmise that the Chamber does not believe that the Statute contains a duty to be present. However, its failure to specifically exclude the existence of a duty suggests that it is not prepared to rule out the idea entirely; particularly where, as here, it was able to reach its conclusion, that the accused could be voluntarily excused from trial, without having to rule on the existence of a duty.

#### **IV. The Contradiction Created by the Existence of a Right and a Duty to be Present**

Viewing the accused's presence at trial as both a right and a duty creates an apparent contradiction. By definition, a right can be freely exercised by the accused, whereas the accused is required to perform a duty. Where a right and a duty overlap, the duty is necessarily dominant because it is compulsory. Put differently, if an accused has a right to decide whether or not he wishes to appear at trial, as well as a duty requiring his or her appearance, the right is extinguished, as it is optional, in favour of the duty, which is obligatory. If there is a duty to be present at trial, it could

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<sup>57</sup> *Ibid.* at para. 54.

<sup>58</sup> *Ibid.* at para. 63.

be argued that there is no right to be present. Clearly, that conclusion is not sustainable because the Statute of every international court and tribunal asserts that such a right exists. Therefore, the right to be present and the duty to be present must encompass different interests.

Reference to the text of the International Covenant on Civil and Political Rights is instructive when determining what the right to be present entails. The International Covenant grants the accused the minimum guarantee to be tried in his presence.<sup>59</sup> Describing the right to be present as a minimum guarantee implies that at a bare minimum the accused must have the opportunity to attend trial if he or she wishes. This interpretation of the right to be present was advanced by the Yugoslavia Tribunal's Trial Chamber in the *Prosecutor v. Zejnil Delalic, et al.* ("Čelebići Camp case"), when the presiding judge, Adolphus Godwin Karibi-Whyte stated of an absent defendant "[i]f he wants to be here, he has a right to be here. There is no doubt about it."<sup>60</sup> As a result, the right to be present is essentially the right not to be unilaterally excluded from trial.<sup>61</sup> The existence of the right prevents courts from proceeding in the absence of the accused unless the accused waives his or her right to be present and the court accepts that waiver.<sup>62</sup>

This construction of the right is also supported by the case law of the European Court of Human Rights. In *Jelcovas v. Lithuania*, the Court found that "a person charged with a criminal offence should, as a general principle based on the

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<sup>59</sup> Article 14(3)(d), (n. 1 above).

<sup>60</sup> *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landžo*, (Trial Transcript), Case No. IT-96-21 (4 November 1997), p. 8973, lines 10-11 ("4 November 1997 Čelebići Camp case Transcript").

<sup>61</sup> A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, (Oxford: Oxford University Press, 2010), 165.

<sup>62</sup> M. H. Zakerhossein and A-M. de Brouwer, 'Diverse Approaches to Total and Partial In Absentia Trials by International Criminal Tribunals', (2015) 26 *Criminal Law Forum* 181, 222.

notion of a fair trial, be entitled to be present at the first-instance hearing.”<sup>63</sup> Although the *Jelcovas* holding does not explicitly interpret the right to be present at trial as securing the accused’s presence if he or she wishes to be present, that inference can be drawn if *Jelcovas* is read together with *Stoichkov v. Bulgaria*. There, the European Court found that the State has a duty “to guarantee the right of the criminal defendant to be present in the courtroom” and also held that it is one of the “essential requirements of Article 6”.<sup>64</sup> That the State would be required to guarantee the right of the accused, that is, not prevent the accused from being present, indicates that the accused’s right to be present should be understood as requiring trial to take place in his or her presence if he or she wishes to attend.

In international criminal law, trial can only legally take place in the absence of the accused if the accused is thought to have waived his or her right to be present at trial.<sup>65</sup> That the accused can choose to waive his or her presence at trial indicates that it is a right and not a duty as the accused has control over the decision of whether or not to exercise the right. If a person is able to waive his or her presence at trial it indicates that he or she is in control of the exercise of the right and not that an obligation has been imposed on the accused.<sup>66</sup>

Most international criminal courts permit trial to continue in the absence of the accused if the accused waives his or her right to be present. The European Court determined that trials conducted in the absence of the accused do not violate the European Convention on Human Rights when there has been an explicit waiver of the

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<sup>63</sup> *Jelcovas v. Lithuania*, (Judgment), App. No. 16913/04 (19 October 2011), para. 108; citing *Sejdovic v. Italy*, Judgment, App. No. 56581/00 (1 March 2006), para. 81.

<sup>64</sup> *Stoichkov v. Bulgaria*, (Judgment), App. No. 9808/02 (24 June 2005), para. 56.

<sup>65</sup> Ruto Trial Chamber Decision (n. 31 above), para. 37.

<sup>66</sup> C. Arangüena Fanego, ‘Requirements in Relation to the Right to a Defence: The Right to Defend Oneself, to Legal Assistance and Legal Aid’, in J. G. Roca and P. Santolaya (eds.); *Europe of Rights: A Compendium on the European Convention of Human Rights*, (Leiden: Martinus Nijhoff Publishers, 2012), 270.

right to be present.<sup>67</sup> It also goes one step further and permits *in absentia* trials when there has been an implicit waiver of the right to be present so long as that implicit waiver is unequivocal.<sup>68</sup> Not surprisingly, the question of what constitutes an unequivocal implicit waiver has been the subject of much litigation.<sup>69</sup>

The Yugoslavia Tribunal allows trial to continue in the absence of the accused following the accused's waiver of his or her right to be present despite the fact that the United Nations' Secretary-General specifically indicated that trial *in absentia* is incompatible with the Tribunal's Statute. The Yugoslavia Tribunal recognised the defendant's ability to explicitly waive his right to be present in the *Čelebići Camp* case. During a discussion about the accused's right to be present Judge Saad Saood Jan stated of the absent defendant "[h]e can waive his right, but this is his right, therefore no part of the proceedings can be held in his absence, unless he waives his right and authorises [his counsel] to represent him."<sup>70</sup> Similarly, the Rwanda Tribunal concluded that the right to be present can be waived by the accused, so long as that waiver is made freely, unequivocally and is done "with full knowledge."<sup>71</sup>

The Yugoslavia Tribunal also allows defendants to implicitly waive their right to be present. In *The Prosecutor v. Mladić*, the Trial Chamber made an oral ruling that Mr. Mladić's disruptive behaviour constituted a waiver of his right to be present during the testimony of the witness then testifying.<sup>72</sup> The jurisprudence of the International Criminal Court supports this position. In the *Ruto and Sang* case the

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<sup>67</sup> *Sejdovic*, (n. 63 above), para. 86; *Kwiatkowska v. Italy*, (Décision), App. No. 52868/99 (30 November 2000).

<sup>68</sup> *Ibid.*, see also *Poitrimol* (n. 39 above), para. 31.

<sup>69</sup> *Ibid.*, *Maleki v. Italy*, Communication No. 699/1996 (27 July 1999); *Kuonov v. Bulgaria*, (Judgment), App. No. 24379/02 (23 May 2006), para. 48.

<sup>70</sup> 4 November 1997 *Čelebići Camp* case Transcript, (n. 60 above), p. 8973, lines 22-25.

<sup>71</sup> *Nahimana Judgment* (n. 35 above), para. 109.

<sup>72</sup> *Prosecutor v. Ratko Mladić*, (Transcript), Case No. IT-09-92-T (8 October 2012), p. 3730, lines 13-15 (*Mladić* 8 October 2012 Transcript").

Appeals Chamber found that in the case of a continuously disruptive defendant “the requirement that the accused be present during trial is superseded by the duty of the Court to ensure that proceedings are carried out in an orderly manner in the interests of the fair and proper administration of justice.”<sup>73</sup> Therefore, “the continuously disruptive behaviour of the accused may be construed as an implicit waiver of his or her right to be present.”<sup>74</sup>

The European Court explained that the proper administration of justice requires that judicial proceedings be conducted with dignity and order.<sup>75</sup> In *Ananyev v. Russia*, the European Court determined that “the flagrant disregard by a defendant of elementary standards of proper conduct” need not be tolerated by the Court and can justify the removal of the defendant from court and the continuation of trial in his or her absence on the grounds that his or her behaviour threatened the proper administration of justice.<sup>76</sup> In such a situation, the defendant’s behaviour can be construed as an implicit waiver of his or her right to be present but only if the defendant could have reasonably foreseen that trial would continue in his or her absence.<sup>77</sup>

Although the international criminal courts that have considered the issue are in agreement, it is a dubious conclusion that a disruptive defendant implicitly waives his or her right to be present at trial. These rulings seem to be a way for the court to justify its decision to remove the accused from the courtroom on the grounds that the removal as the accused’s waiver of his or her right, when in fact, the Court is really acting of its own volition. However, the necessary elements required to imply waiver of a fundamental right may be lacking under these circumstances. For the waiver of a

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<sup>73</sup> *Ruto* Appeals Chamber Decision, (n. 56 above), para. 51.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ananyev v. Russia*, (Judgment), Application No. 20292/04 (30 July 2009), para. 44.

<sup>76</sup> *Ibid.* at paras. 44-45.

<sup>77</sup> *Ibid.* at para. 45.

fundamental right to be implied, it must be unequivocal.<sup>78</sup> An implicit waiver of the right to be present is unequivocal when it is determined that the accused unambiguously wants trial to continue in his or her absence and that he or she was aware that sufficiently disruptive behaviour could result in removal.<sup>79</sup> Although it demands a case specific inquiry, it is unlikely that every disruptive accused wishes to be removed from the courtroom and for trial to continue in his or absence. In fact, in many instances it is probably the opposite; that the accused would like to remain in the courtroom so that he or she might continue to interrupt the smooth running of the proceedings.

It is not as difficult to determine whether the accused is aware that his or her actions could result in removal. The European Court has made clear that a trial court has the responsibility of informing a disruptive accused of the consequences of his or her actions before ordering him or her out of the courtroom.<sup>80</sup> Therefore, if the evidence indicates that the Court carried out that responsibility it can easily be shown that the accused was aware of the consequences of continued disruption. This could also act as evidence that the accused unequivocally waived his or her right to be present. Once an accused is aware that further interference with court proceedings could result in removal, it could reasonably argued that continued disruption acts as an unequivocal waiver of the right to be present as the accused is making the active

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<sup>78</sup> *Colozza v. Italy* (Judgment), Application No. 9024/80 (12 February 1985), paras. 28; *Oberschlick v. Austria* (Judgment), Application No. 1162/85 (23 May 1991), para. 51; *Pfeiffer and Plankl v. Austria* (Judgment) Application No. 10802/84 (25 February 1992), para. 37; *Jones v. United Kingdom* (As to the Admissibility of Application Number 30900/02 by Anthony Jones Against the United Kingdom), Application No. 30900/02 (9 September 2003); *Khalfaoui v. France* (Judgment), Application No. 34791/97 (14 March 2000), para. 51; *Sibgatullin v. Russia* (Judgment), Application No. 32165/02 (14 September 2009), para. 46; *Yavuz v. Austria* (Judgment), Application No. 46549/99 (27 August 2004), para. 45; *Battisti v. France* (Décision), Requête. No. 28796/05 (12 décembre 2006) (translated from french); *Hermi v. Italy* (Judgment), Application No. 18114/02 (18 October 2006), para. 74; *Ananyev* Judgment (n. 75 above), para. 44; *see also Ruto* Appeals Chamber Decision, (n. 56 above), para. 51 (Here, the International Criminal Court's Appeals Chamber recognises the European Court of Human Rights findings regarding implicit waivers).

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at paras. 45-46.

decision to continue to disrupt the trial despite knowing it could result in his or her removal.

Despite international criminal courts and tribunals going to great lengths to show that a disruptive accused has waived his or her right to be present at trial, the decision of the International Criminal Court's Appeals Chamber in *Ruto and Sang* raises an interesting question: can courts exclude a disruptive defendant in the interests of justice without there being a corresponding waiver of the right to be present? The answer appears to be yes as the proper administration of justice may supersede the necessity of ensuring a disruptive accused's right to be present. There is little precedent supporting this conclusion although a ruling by the Yugoslavia Tribunal's Trial Chamber is instructive. During the *Čelebići Camp* case, one of the accused, Zdravko Mucić, refused to appear in court and also explicitly refused to waive his right to be present.<sup>81</sup> The court chose to proceed in Mr. Mucić's absence despite the fact that he had refused to waive his right to be present. The court reasoned that Mr. Mucić's absence was a tactic to delay trial and that the Trial Chamber owed "a moral and legal obligation" to Mr. Mucić, "the country and to the universe at large and to all involving the administration of justice" to continue trial in his absence.<sup>82</sup> The Trial Chamber indicated that Mr. Mucić could not unilaterally decide not to attend trial and refuse to waive his right to be present as permitting him to do so would be tantamount to a finding that Mr. Mucić had the right to control the progress of the proceedings.<sup>83</sup> This ruling is enlightening because it allowed the court to continue proceedings even when the accused explicitly refused to waive his right to be present. It suggests that while it may be procedurally preferable to find that the

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<sup>81</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (Trial Transcript), Case No. IT-96-21 (17 April 1998), p. 11332, lines 17-22.

<sup>82</sup> *Ibid.* at p. 11376, lines 17-24; p. 11377, lines 1-10.

<sup>83</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo* (16 April 1998 Trial Transcript), Case No. IT-96-21 (16 April 1998), p. 11262, lines 8-14.

accused has either explicitly or implicitly waived his or her right to be present, such a waiver is not strictly necessary if the court can justify continuing trial on the grounds that to do so would facilitate the proper administration of justice.

The proper administration of justice is often cited as one of the key reasons why courts should be allowed to proceed in the absence of the accused. If the right to be present prevents the court from conducting proceedings without first affording the accused the opportunity to attend if he or she so pleases, then the duty to be present requires the presence of the accused at trial in recognition of his or her active role as a participant in proceedings and “the wider significance of the presence of the accused for the administration of justice.”<sup>84</sup> Presence at trial as a duty is seen as a choice to respect the “institutions of justice” above the rights of the accused.<sup>85</sup> A key determination is whether holding trial in the absence of the accused is in the interests of justice.

The fear that the interests of justice might be subverted is the main driving force behind much of the commentary supporting a finding that the accused’s presence at trial is a duty. This argument is rooted in the Human Rights Committee’s comment in *Mbenge v. Zaire*. There the Committee stated that *in absentia* proceedings “are in some circumstances... permissible in the interest of the proper administration of justice.”<sup>86</sup> A determination as to what is meant by “the proper administration of justice” is necessarily a theoretical endeavour as it has no firm meaning and an understanding of the issue depends on an individual’s perception of what constitutes justice.<sup>87</sup>

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<sup>84</sup> *Ruto Appeals Chamber Decision*, (n. 56 above), para. 49.

<sup>85</sup> S. J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights*, (Oxford: Hart Publishing, 2007), 114.

<sup>86</sup> Mbenge Comment, (n. 45 above), para. 14.1

<sup>87</sup> N. Jørgensen, ‘The Right of the Accused to Self-Representation Before International Criminal Tribunals’; (2004) 98 *American Journal of International Law* 711, 722; H. Crombag, ‘Adversarial or



On one side is the assertion that *in absentia* trials may be conducted under any circumstances so long as doing so would be within the “proper administration of justice.”<sup>88</sup> From that perspective, justice is perceived as righting a wrong committed by the accused. Within this context, the accused is viewed as being “brought” to justice for the crimes he or she is alleged to have committed.<sup>89</sup> The rationale behind this position is that the course of justice must proceed even if the accused refuses to participate in the proceedings.<sup>90</sup> This view does not countenance the notion that failing to provide the accused with all of the rights he or she is entitled to could also lead to injustice because the injustice being addressed is the one the accused is alleged to have committed. Rather, presence at trial is plainly understood as a duty rather than a right because justice can only be achieved if the accused is present in court and available for punishment.

The Special Court for Sierra Leone took a similar position. In *The Prosecutor v. Issa Hassan Sesay, et al.*, the Special Court’s Trial Chamber observed that criminal law does not allow an absent or disruptive accused “to impede the administration of justice or frustrate the ends of justice.”<sup>91</sup> This ruling was in response to Defendant, Augustine Gbao’s refusal to attend any further hearings because he did not recognise the legitimacy of the Special Court.<sup>92</sup> To halt trial under these circumstances would have been “tantamount to judicial abdication of the principle of legality and a

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Inquisitorial: Do we Have a Choice?’, in Peter J. van Koppen and Steven D. Penrod (eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*, (London: Kluwer Academic, 2003), 23-24.

<sup>88</sup> Pons, (n. 8 above), 1318.

<sup>89</sup> P. Gaeta, ‘Trial in Absentia Before the Special Tribunal for Lebanon’, in A. Alamuddin, N. Jurdi and D. Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014), 250.

<sup>90</sup> *Ibid.* at 237.

<sup>91</sup> *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, (Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court of Sierra Leone on 7 July 2004 and Succeeding Days), Case No. SCSL-04-15-T (12 July 2004), para. 8.

<sup>92</sup> *Ibid.* at para. 2.

capitulation to a frustration of the ends of justice without justification.”<sup>93</sup> By ascribing its position to criminal law generally suggests that the Trial Chamber viewed this notion as being a general principle of law. The Court echoed this sentiment in *The Prosecutor v. Samuel Hinga Norman, et al.* when it found that it is not “in the interests of justice to allow the Accused’s deliberate absence from the courtroom to interrupt the trial” and that any deliberate absence “will certainly undermine the integrity of the trial and will not be in the interests of justice.”<sup>94</sup>

Others have taken the contrary position and asserted that ‘the interests of justice’ includes respecting the accused’s right to a fair trial.<sup>95</sup> This belief encompasses a concern that conducting trials *in absentia* as punishment for failing to appear at trial will result in delegitimizing international tribunals, as doing so will call into question any verdicts entered against the accused in those circumstances.<sup>96</sup> Antonio Cassese recognized that the accused’s failure to appear at trial could prevent trials from occurring and “make a mockery of international justice”, but he also believed that the “paucity and inconsistency of international rules” regarding trial *in absentia* demonstrated that it was in the interests of justice not to construe presence at trial as a duty.<sup>97</sup>

In *Prosecutor v. Blškić*, the Appeals Chamber of the Yugoslavia Tribunal found that generally speaking conducting a trial *in absentia* “would not be appropriate” even when the accused has waived the right to be tried in his or her

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<sup>93</sup> *Ibid.* at para. 8.

<sup>94</sup> *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, (Ruling on the Issue of Non-Appearance of the First Accused, Samuel Hinga Norman, The Second Accused, Moinina Fofana and the Third Accused, Allieu Kondewa at the Trial Proceedings), Case No. SCSL-04-14-PT (1 October 2004), para. 22.

<sup>95</sup> Jørgensen, (n. 87 above), 722.

<sup>96</sup> J. Sloan, ‘The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look’, (1996) 9(2) *Leiden Journal of International Law* 479, 479-80.

<sup>97</sup> A. Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003), 402-403.

presence.<sup>98</sup> However, the Appeals Chamber did find that it could conduct *in absentia* proceedings in matters involving the secondary jurisdiction of the tribunal, like contempt proceedings, because those matters involved “obstructing the administration of justice.”<sup>99</sup> The logical interpretation of this holding is that *in absentia* trials are justified when the accused has obstructed the administration of justice. Because the Tribunal found that *in absentia* trials were not permissible when prosecuting crimes under the primary jurisdiction of the court, it follows that the Tribunal does not believe that the absence of the accused from trial when accused of primary jurisdiction crimes constitutes an obstruction of the administration of justice.

There is no clear agreement as to whether the interests of justice are impaired if the accused is not present during trial. In the face of such a disagreement, it is difficult to impose a duty on the accused to be present since the evidence does not wholly support the imposition of that duty. Therefore, any duty imposed on the accused to appear at trial cannot be derived out of a concern that his or her absence will undermine the interests of justice, because it is unclear whether the available evidence supports such a conclusion.

Waivers of the right to be present have also been found in instances not involving disruptive defendants. The Appeals Chamber of the Rwanda Tribunal found that defendant, Jean-Bosco Barayagwiza freely, explicitly and unequivocally waived his right to be present at trial by refusing to appear during trial and that the Trial Chamber did not err in conducting trial in his absence.<sup>100</sup> Following his conviction, Mr. Barayagwiza challenged the legality of his trial on the grounds that trials *in absentia* are incompatible with the Tribunal’s Statute and Rules of Procedure and

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<sup>98</sup> *The Prosecutor v. Tihomir Blškić*, (Judgement on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997), Case No. IT-95-14-AR108bis (29 October 1997), para. 59.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, para. 116.

Evidence.<sup>101</sup> The Appeals Chamber denied his appeal and found that trials *in absentia* are permissible if the accused exercises a free, unequivocal and knowledgeable waiver of that right.<sup>102</sup> This holding conforms to the idea that presence at trial is a right. Here, Mr. Barayagwiza was aware that trial was taking place and continued to choose not to attend. Therefore, his absence was the result of his choice not to exercise his right to be present. The defendant's ability to choose to absent himself from trial was later codified in May 2003, when the Tribunal amended its Rules and added Rule 82 *bis*, allowing trials to take place in the absence of the accused when the accused chooses to boycott trial.<sup>103</sup>

The International Criminal Court also recognises the importance of the accused's waiver of the right to be present. In 2013, the International Criminal Court changed its Rules of Procedure and Evidence to permit portions of the trial to continue in the absence of the accused. Rules 134 *bis*, 134 *ter* and 134 *quater* all emphasise the importance of the accused waiving his or her right to be physically present in the court before trial can take place in his or her absence.<sup>104</sup> Rule 134 *bis* permits the defendant to request that he or she be permitted to appear at "part or parts" of his or her trial via video technology.<sup>105</sup> Rule 134 *ter* and Rule 134 *quater* requires that any absence on the part of the accused has to be accompanied by an explicit waiver of his or her right to be present at trial.<sup>106</sup> By placing the power in the hands of the accused to explicitly waive his or her presence at trial, the Assembly of

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<sup>101</sup> Nahimana Judgment, (n. 35 above), para. 94.

<sup>102</sup> *Ibid.*, para. 109.

<sup>103</sup> W. A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', in G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure: Towards a Coherent Body of Law* (London: CMP Publishing, Ltd., 2009), 364; Gaeta, (n. 90 above), 235-36.

<sup>104</sup> Rule 134 *bis*, Rule 134 *ter* and Rule 134 *quater*, Rules of Procedure and Evidence, International Criminal Court.

<sup>105</sup> Rule 134 *bis*(1), Rules of Procedure and Evidence, International Criminal Court.

<sup>106</sup> Rule 134 *ter*(2)(a) and Rule 134 *quater*(1), Rules of Procedure and Evidence, International Criminal Court.

State Parties recognised that trial can only take place absent the accused when the accused has specifically authorised that absence.

It remains in doubt whether Rules 134 *bis*, 134 *ter* and 134 *quater* are compatible with the International Criminal Court's Statute. Introduced as a response to the litigation surrounding Kenyatta and Ruto's requests to be absent from trial, the permissive waiver regime contained in the new rules permits the accused to absent him or herself from much more of the trial than is explicitly allowed by the Statute.<sup>107</sup> It is difficult to see how these new rules comport with the duty to be present as proposed by the *Ruto* Trial Chamber. Allowing trial to continue in the absence of the accused in a greater number of instances than previously permitted does not align with the idea that the accused is required to be present at trial. Further, making those absences dependent on a waiver by the accused suggests that these types of absences are the natural consequence of the accused's decision not to exercise his or her right to be present. It logically follows that if the accused must agree to trial taking place in his or her absence then the accused cannot be prevented from attending trial if he or she wishes to attend. If there is no consent, i.e. no waiver, trial cannot lawfully occur. Therefore, the right to be present must be defined as the right not to be excluded. Therefore, if Article 63(1) does contain a duty to be present, these new rules run afoul of Article 51(4) of the Statute, requiring amendments to the Rules of Procedure and Evidence to be "consistent with this Statute", and Article 51(5), which indicates that the Statute will prevail when there is a conflict between the Statute and the Rules of Procedure and Evidence.<sup>108</sup>

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<sup>107</sup> K. Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford: Oxford University Press, 2016), 164.

<sup>108</sup> Articles 51(4) and 51(5), Statute of the International Criminal Court.

The accused's ability to decide whether trial can be conducted in his or her absence through the exercise of a waiver may be a strong indicator that the accused has a right to be present at trial but it is not conclusive. Waiver can also indicate a duty to be present depending on how that waiver is established. The Special Tribunal for Lebanon opened itself up to criticism by permitting trials in the absence of the accused based on a waiver presumed through the non-appearance of the accused following notice by publication.<sup>109</sup> The Special Tribunal concluded that notice could be assumed due to the fact that the efforts undertaken in Lebanon to publicise the Tribunal's first indictment made it "inconceivable that [the four accused] could be unaware that they had been indicted".<sup>110</sup> The Special Tribunal's Trial Chamber took this supposition one step further in the *Merhi* case and found that "[t]he fact that [Mr. Merhi] has failed to respond to the charges either in person or through a lawyer leads to the conclusion that he has elected not to attend the hearing and has therefore waived his right to be present."<sup>111</sup>

Allowing trial to commence or continue in such a situation falls well short of the unequivocal waiver required by most other international courts and tribunals. Assuming waiver based on less than conclusive evidence raises significant questions as to whether the accused's absence is the result of an active choice not to attend trial. Because there is no clear indication that the accused's absence is the result of a choice not to be present, trials *in absentia* conducted under these circumstances are best viewed as the result of the accused's failure to comply with the duty to be present.

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<sup>109</sup> B. Elberling, 'The Next Step in History-Writing Through Criminal Law: Exactly how Tailor-made is the Special Tribunal for Lebanon'; (2008) 21(2) *Leiden International Law Journal* 529, 537; W. Jordash and T. Parker; 'Trials *in Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law', (2010) 8 *Journal of International Criminal Justice* 487, 491.

<sup>110</sup> *Prosecutor v. Salim Jamil Ayyash, et al.*, (Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial *in Absentia* Decision), Case No. STL-11-01/PT/AC/AR126.1 (1 November 2012), para. 45; *quoting Prosecutor v. Salim Jamil Ayyash, et al.*, (Decision to Hold Trial *in Absentia*), Case No. STL-11-01/I/TC (12 January 2012), para. 106.

<sup>111</sup> *Prosecutor v. Hassan Habib Merhi*, (Decision to Hold Trial *in Absentia*, Trial Chamber, Special Tribunal for Lebanon), Case No. STL-13-04/I/TC (20 December 2013), para. 103.

Waiver implied through silence or inaction indicates a duty to appear couched as a failure to exercise the right to appear. However, failing to exercise a right is different from declining to exercise a right. When an accused waives his or her right to be present, either explicitly or implicitly, it must be unequivocal and it is seen as an informed decision not to exercise the right to be present. Failure to exercise a right through silence or inaction does not carry with it the same indicia that it was the product of an informed decision. It suggests an obligation because it reverses how the right is understood. Rather than approach trial in the absence of the accused as the result of an accused's decision not to attend, it views trial *in absentia* as the natural result of a failure to act. In this way, trial *in absentia* is seen as a legitimate exercise of a court's powers.<sup>112</sup>

When trial *in absentia* is utilised, it is justified on the grounds that the accused's willful absence from trial constitutes "bad faith conduct" by the accused and that such actions should not be allowed to delay or frustrate the smooth progress of trial.<sup>113</sup> From that perspective, reflective of the inquisitorial tradition, the overriding interest in justice belongs to the public and that the goal of criminal prosecution is to arrive at the truth.<sup>114</sup> It perceives the defendant's absence as "halting the course of justice" which must be allowed to proceed so the social peace disturbed by the criminal offence can be restored.<sup>115</sup> It understands justice as something that is only available to the victims. The accused can only thwart justice and not benefit

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<sup>112</sup> Gaeta, (n. 89 above), 237.

<sup>113</sup> E. Trendafilova, 'Fairness and Expedition in the International Criminal Court's Pre-Trial Proceedings', in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, (Leiden: Martinus Nijhoff Publishers, 2009), 449; Gaeta, (n. 90 above), 237.

<sup>114</sup> R. Riachy 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon' (2010) 8 *Journal of Int'l Crim. Just.* 1295-1305, 1297.

<sup>115</sup> *Ibid.*, see also Gaeta, (n. 89 above), 237.

from it.<sup>116</sup> The failure of the accused to appear at trial is understood as a disruption to the course of justice and by not appearing the accused forfeits his or her right to participate in trial.<sup>117</sup>

However, this position comes directly into conflict with the general requirement that trial can only proceed following the accused's unequivocal waiver of the right to be present. Understanding trial *in absentia* as the natural result of a failure to act deprives the accused of the ability to exercise his or her waiver of the right to be present. By finding that the accused implicitly waived their right to be present based on constructive knowledge, the Special Tribunal took the decision to appear away from the accused by assuming their consent to be tried in their absence without any positive evidence supporting that conclusion. This decision does not comport with the right to be present as currently constructed in international criminal law.

## **V. The Beneficiary of the Duty**

An additional issue with describing presence as a duty is determining to whom the duty is owed. One suggestion is that the duty is owed to the victims of the alleged crimes. It is thought that the decision not to compel the appearance of the accused, or hold trial in the absence of the accused, leaves the victims “without any judicial establishment of criminal responsibility.”<sup>118</sup> The failure to hold someone accountable for the crimes committed is seen as preventing the victims from achieving the sort of individual and collective healing needed to allow them to move on with their lives.<sup>119</sup>

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<sup>116</sup> Dov Jacobs, ‘The Unique Rules of Procedure of the STL’, in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds.), *The Special Tribunal for Lebanon: Law and Practice*, Oxford University Press, London, 2014, p. 115.

<sup>117</sup> Gaeta, (n. 89 above), 237.

<sup>118</sup> A. Orie, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC’, in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford: Oxford University Press, 2002), 1480.

<sup>119</sup> E. Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope over Experience’, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court*, (Oxford: Hart Publishing, 2004), at 315, citing C. Jorda and J. de Hemptinne, ‘The



Therefore, by construing presence at trial as a duty, and imposing trial *in absentia* as a sanction, it is supposed that any determination of criminal accountability will be satisfactory for the victims. The flaw in this argument is that it assumes that an absent accused is a guilty accused by equating the absence of the accused with the denial of a judicial establishment of criminal responsibility. For this to be the case, the accused must be guilty of the crimes alleged. An innocent, absent accused does not deny the victims of anything. Nor are victims interested in the conviction of any accused.<sup>120</sup> The only way the victims can achieve a true benefit from trial is if the right accused is convicted.<sup>121</sup>

The idea that a duty is owed to the victims also relies on the notion that victims achieve healing through the conviction of the perpetrators of the crimes committed against them. Research suggests that although many people assume that trial will promote healing amongst the victims, in fact, it can result in the victim being forced to relive traumatic experiences and lead to re-victimisation.<sup>122</sup> This danger is increased in the context of *in absentia* trials as an accused convicted in his or her absence generally has a right to re-trial once he or she comes under the jurisdiction of the relevant court.<sup>123</sup> Additionally, it is dubious whether the victims are able to overcome their trauma when giving evidence in the absence of the accused.<sup>124</sup>

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Status and Role of the Victim', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford: Oxford University Press, 2002), 1400-01.

<sup>120</sup> D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and Their Participation in Proceedings', in Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Hart Publishing, Oxford, 2008), p. 1283.

<sup>121</sup> *Ibid.*

<sup>122</sup> M. Rauschenbach and D. Scalia, 'Victims and International Criminal Justice: A Vexed Question?', (2008) 90(870) *International Review of the Red Cross* 441, 445-46.

<sup>123</sup> Article 22(3), Statute of the Special Tribunal for Lebanon; *Maleki*, (n. 69 above), para. 9.5; *Sejdovic*, (n. 63 above), para. 82; *Somogyi v. Italy*, (Judgment), App. No. 67972/01 (18 May 2004), para. Colozza, (n. 17 above), para. 29; *Krombach v. France*, (Judgment), App. No. 29731/96 (13 February 2001), para. 85; *Einhorn v. France*, (Final Decision as to the Admissibility of Application no. 71555/01), App. No. 71555/01 (16 October 2001), para. 33; Schabas, (n. 103 above), 380; Gaeta, (n. 89 above), 243-44; Jordash and Parker, (n. 109 above), 498.

<sup>124</sup> A. Schwarz, 'The Legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal

Therefore, victims testifying against absent defendants will likely be subjected to at least two trials, increasing the possibility for re-victimisation.

The victim-oriented argument also fails to take into account the fact that an accused convicted in his or her absence means that there will be no one to punish if a guilty verdict is returned.<sup>125</sup> Victims are frequently dissatisfied with the verdict and sentence imposed on the perpetrators of the crimes against them as they generally feel that the punishment does not adequately reflect the suffering of the victims.<sup>126</sup> It is reasonable to assume that victim dissatisfaction would only intensify if there is no accused present to serve the sentence imposed. Further, failure to punish responsible criminal perpetrators is seen as having a negative effect on the reconciliation process.<sup>127</sup> Therefore, trials in the absence of the accused may serve the opposite of the intended purpose and result in further frustration and discontentment on the part of the victims.

## VI. CONCLUSION

It is indisputable that the accused has a generally recognized right to be present at trial. However, the recent jurisprudence of the International Criminal Court in the *Ruto and Sang* case indicates that the accused also has a duty to appear at trial. This initially suggests a contradiction in the law, however, the right and the duty to be present actually relate to different interests and are therefore not in conflict. The accused's right to be present is better understood as the right not to be excluded from trial if the accused wishes to attend. This does not prevent trial from taking place in the absence of the accused as the accused may waive his or her right to be present.

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Court and Their Compatibility with Human Rights', (2016) 16 African Human Rights Law Journal 99, 115.

<sup>125</sup> S. Trechsel, *Human Rights in Criminal Proceedings*, (Oxford University Press, Oxford, 2005), 253.

<sup>126</sup> Rauschenbach and Scalia, (n. 122 above), 447.

<sup>127</sup> S. J. Ivković, 'Justice by the International Criminal Tribunal for the Former Yugoslavia', (2001) 37 *Stanford Journal of International Law* 255, 263.

The duty to be present is the recognition of the accused's active role in proceedings and its important place in the proper administration of justice. If the accused fails to appear, the court may conduct trial *in absentia* in recognition of the accused's responsibilities and as punishment for failing to appear.<sup>128</sup> However, conducting trial in the absence of the accused as a punishment for his or her failure to appear directly conflicts with the fundamental responsibility of a criminal court to carry out its duties "with due regard to the rights of the accused."<sup>129</sup> If criminal courts are required to function with due regard for the rights of the accused, those same courts cannot inflict punishment on the accused if they disagree with the manner in which the accused chooses to exercise his or her rights.

As a result, although courts have found that the presence of the accused at trial is both a right and a duty, courts should be wary of allowing the right to be consumed by the duty. When weighing the decision to proceed in the absence of the accused, the court should heed Mirjan Damaska's concern that de-emphasising the importance of defence rights in favour of other interests might result in those rights becoming undervalued and lead to the conviction of innocent defendants.<sup>130</sup> While the interests of the public are important, they must give way if they create a danger of convicting innocent defendants. Placing the efficient operation of the justice system ahead of defence rights is a slippery slope because an argument can be made that the system would function most effectively if the accused had no rights at all. Once the rights of the accused are compromised to a small extent it becomes easier and easier to further limit those rights in the interests of a smoothly operating justice system. Rights must not be restricted or impaired in such a way as to compromise the basic purpose of that

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<sup>128</sup> Pons, (n. 8 above), 1309.

<sup>129</sup> Jordash and Parker, (n. 109 above), 500.

<sup>130</sup> M. Damaska, 'Reflections on Fairness in International Criminal Justice', (2012) 10 *Journal of International Criminal Justice* 611, 615.

right.<sup>131</sup> If one accepts that the accused has a duty to be present under international criminal law, one must also accept that it cannot be applied so as to invalidate any of the rights of the accused.

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<sup>131</sup> L.G. Loucaides, 'Questions of Fair Trial Under the European Convention on Human Rights', (2003) 3 *Human Rights Law Review* 27, 41.